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AUTOMOBILES—LIABILITY OF DEFENDANT OWNER TO GRATUITOUS PASSENGER—ACQUIESCENCE IN SPEED AS CONSTITUTING CONTRIBUTORY NEGLIGENCE.—The defendant was driving his automobile accompanied by his wife and three guests, one of whom was the plaintiff. A sleet storm had glazed the roads with ice the previous night, but the defendant, an experienced driver, drove at a rate of between 35 and 40 miles per hour, nevertheless. The plaintiff, also an experienced driver, realized the danger of traveling so fast and remarked to those sitting in the rear seat with him that the roads were treacherous, but he said nothing to the defendant and did not protest against the rate of speed. As they approached a hill, the defendant turned his head to hear what someone in the rear was saying and the automobile skidded and overturned, injuring the plaintiff. For the injuries so sustained, he sued the defendant. A verdict was rendered for the defendant, but on motion of the plaintiff the court ordered a new trial. From this order, the defendant appealed to the Supreme Court. After the court disposed of the objection of the plaintiff to an instruction that he had assumed the risk of the automobile's skidding, the plaintiff petitioned for a rehearing on the ground that the court had not considered his assignment of error based on an instruction of the lower court that if the plaintiff knew the defendant was traveling at a negligent rate of speed, the plaintiff was guilty of contributory negligence if he did not protest or warn the defendant. *Held,* that this was sufficient to constitute contributory negligence and the petition was denied. *Eddy* v. *Wells,* 231 N. W. 785 (N. D., 1930).

The principle announced in this case appears to be based on the combination of two theories, the first relating to the duty of a driver to a gratuitous guest, and the second to the contributory negligence of such a guest. "As to a gratuitous guest in a vehicle on a public highway, the owner or driver of such vehicle owes to such guest the duty of exercising ordinary care to avoid personal injury to him."[1] On the other hand, a guest is himself required to exercise such care as is reasonable and practicable to avoid injury to himself.[2] A gratuitous guest cannot sit idly by, observe clear violations of law, in fact acquiesce in them, and then, in the event of an accident hold his host liable in damages.[3] The cases are of course more numerous in which the action is being brought by a guest in one car against the driver of another car through whose negligence an accident has occurred. We find that contributory negligence on the part of the driver of

[1] Marple v. Haddad, 103 W. Va. 508; Mitchell v. Raymond, 181 Wis. 591; Jacobs v. Jacobs, 141 La. 272.

[2] Clark v. Connecticut Co., 83 Conn. 219; Leclair v. Boudreau, 101 Vt. 270.

[3] Harding v. Jesse, 189 Wis. 652.

the car in which the guest is riding is not imputed to the guest under ordinary circumstances, but there is an exception where the guest, with the knowledge of the danger, remains in the dangerous position.[4] "What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances, one of which is that he is merely a passenger, having no control over the management of the vehicle."[5] Incidentally, it has been held that if the guest is an officer of the law having authority to control the speed of the car and yet makes no effort to do so but, on the contrary, by his silence, acquiesces in its being driven at an unlawful speed, he is guilty of contributory negligence which defeats his recovery.[6] Coming to those cases where the action is brought by the guest against the driver of the car in which he was riding, it is found that, on the one hand, a person who invites another to ride with him will be liable for injuries sustained by the guest caused by such rapid driving, against the protest of the guest, as to result in a collision with an obstruction in the street.[7] On the other hand, it is said the rule is well established that when possible dangers —arising out of the negligent operation of a hired vehicle or a conveyance in which one is riding as an invited guest—are manifest to a passenger who has adequate opportunity to control the situation, if he sits by without protest and permits himself to be driven on to his injury, this is negligence which will bar his recovery.[8] While it may appear without much controversy that the holding in the principal case under discussion is just and fair, considering the circumstances there present, there is some danger in establishing a definite rule of this kind with respect to acquiescence as to speed constituting contributory negligence. It would seem better to leave the matter to the discretion of the jury which, after due consideration of all the circumstances of the particular case, could determine whether or not contributory negligence had been present. Such a method is adopted in many jurisdictions, among them Illinois.[9]

CONSTITUTIONAL LAW—POLICE POWER—TO WHAT EXTENT THE COURT MAY CONSIDER AESTHETIC OBJECTIONS IN DETERMINING WHETHER OR NOT ERECTION OF BILLBOARDS HAS ANY RELATION TO HEALTH, MORALS OR GENERAL WELFARE.—Complainant sued to restrain the park board of Indianapolis from interfering with the maintenance and operation of billboards located within 500 feet of certain parks and boulevards. The park board's action was based on a city ordinance, adopted by

[4] Rebillard v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 216 Fed. 503.
[5] Clarke v. Connecticut Co., 83 Conn. 219.
[6] Hubbard v. Bartholomew, 163 Iowa 58.
[7] Beard v. Klusmeier, 158 Ky. 153; Fitzjarrel v. Boyd, 123 Md. 497.
[8] Hardie v. Barrett, 257 Pa. 42.
[9] Eimer v. Miller, 255 Ill. App. 465.

authority of the Indiana statute.[10] The complainant alleged the signs were safe, bore the advertisements of reputable firms, were artistically decorated, and were maintained in a sightly manner. Their value was $125,000. The ordinance, complainant contended, failed to provide compensation for destruction of its business and imposed unusual and oppressive restrictions on its business, thus being a violation of Art. I, sec. 21 of the Constitution of Indiana, and Amendment XIV, sec. 1 of the Constitution of the United States. They also objected that the court could not deprive them of property merely in furtherance of aesthetic objects. Defendants' demurrer was sustained. *Held,* that ordinance prohibiting billboards within 500 feet of park or boulevard is valid, but existing billboards may not be interfered with except on payment of compensation. Reversed. *General Outdoor Advertising Co.* v. *City of Indianapolis Department of Public Works,* 172 N. E. 309 (Ind. 1930).

The court will not interfere with a municipality in the exercise of its police powers,[11] and municipalities may reasonably control and regulate construction and maintenance of billboards under police power, express or implied.[12] No rights under the Fourteenth Amendment to the Federal Constitution are abridged by a municipal ordinance regulating the size, construction and location of billboards with relation to ground, buildings, boundaries of lot and street line.[13] Where the regulations have a reasonable relation to safety, health, and morals, aesthetic considerations enter, and where the regulation does not apply to the entire city, but to the vicinity of public parks and boulevards, it may properly have a relation of public health, comfort and welfare which it would not otherwise possess.[14] When property becomes a nuisance it can be abated without compensation to the owner and at his expense.[15] But police power cannot be exercised for purely aesthetic purposes.[16] And "it cannot be said that interference with private rights for purely aesthetic purposes will promote general welfare."[17] From the language used by some decisions it may be inferred that building regulations may not rest on aesthetic considerations.[18] Some courts have held that "aesthetic considerations are a matter of luxury" and consequently little heed should be paid to them and it was declared in a Delaware case that citizens must not be compelled to give up rights in property merely to attain aesthe-

[10] Burns' 1926 (Indiana) Statutes, Sec. 10625.
[11] Stuck v. Town of Beech Grove, 201 Ind. 66.
[12] Cusack v. Chicago, 242 U. S. 526; Cusack v. Chicago, 267 Ill. 344.
[13] St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269.
[14] Ayer v. Commissioners on Height of Buildings in Boston, 242 Mass. 349; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269.
[15] Rowland v. Morris, 152 Ga. 842.
[16] Curran Bill Posting and Distributing Co. v. Denver, 47 Colo. 221; Byrne v. Maryland Realty Co., 129 Md. 202.
[17] Haller Sign Works v. Physical Culture Training School, 249 Ill. 436.
[18] People ex rel. Friend v. People of Chicago, 261 Ill. 16.

tic objects.[19] The beauty of a residence neighborhood is for the comfort and happiness of the residents, and it sustains the value of the property in the neighborhood.[20] Briefly, aesthetic considerations alone are not sufficient under the law today, McQuillen says, to warrant exercise of police power to prohibit billboards generally throughout a city because such considerations of themselves do not of necessity justify taking private property without compensation.[21]

JOINT ADVENTURERS—RIGHTS AND LIABILITIES OF PARTIES—LIABILITY IN FIDUCIARY CAPACITY AS COMPARED WITH THAT OF COPARTNERS.—The defendant was joint adventurer with the plaintiffs in the ownership of a factory building which was purchased as a speculation but was an unsuccessful venture from the start. It was decided that the defendant, holder of the largest interest, should purchase the interests of his two associates at a price which made them heavy losers. Within five days after the sale, the defendant sold the property to a tenant in the building at a substantial profit. The two former associates filed a bill for an accounting and division of the profit. They alleged that the defendant knew the purchaser to be a probable buyer at the time he bought their interests and that his concealing of such facts was a breach of the trust and confidence which he owed to them because of their fiduciary relationship. *Held,* that plaintiffs were entitled to an accounting. *Bowne* v. *Windsor,* 151 Atl. 124, (N. J. Eq. 1930).

The greater part of the opinion of the court is concerned with a review of the evidence of the case establishing the fact that the defendant did withhold the knowledge of the prospective purchaser from his associates. So positive was the court of the rule to be applied in the case that a single sentence suffices to express its opinion: "The relation of joint adventurers, like that of copartners, is fiduciary, one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." Some understanding of the relationship existing in a joint adventure and a review of many cases clearly substantiates the court's views. The liability of fiduciaries for good faith in all their dealings is so well established that it needs little confirmation. A person is said to stand in fiduciary relation to another when he has rights and duties which he is bound to perform for the other's benefit, and in such case he is not allowed to derive any profit or advantage from the relation between them except upon proof of full knowledge and consent of the other person.[22] This rule is applied without modification to partnerships.[23] At common law, joint adventurers were

[19] Wilmington v. Turk, 14 Del. Ch. 392.
[20] Civello v. New Orleans, 154 La. 171.
[21] Municipal Corporations, (2nd) 80-83.
[22] Dick v. Albers, 243 Ill. 231.
[23] Gilbert & O'Callighan v. Anderson, 73 N. J. Eq. 243; Jackson v. Hooper, 76 N. J. Eq. 185.

looked upon as being in the nature of a loose form of partnership. It has only been in comparatively recent times that the courts recognized the existence of a "limited partnership known as a joint adventure . . . not limited in the statutory sense as to liability of the partners but as to its scope and duration."[24] The distinction between the liability of partners and of joint adventurers is found in the liability to third persons. As between themselves and within the scope of their venture, joint adventurers are liable in the same way as partners. "They (joint adventurers) . . . have the right to expect and demand from their associates good faith in all that relates to their common interest. . . . Although there is a distinction between a partnership and a joint adventure, they are of similar nature and the rules of law applicable to partnerships apply to joint adventures."[25] This is closely followed in a Wisconsin case where we find the statement that "relations existing between joint adventurers, while not strictly that of partners, have many of the essential elements of such a relationship."[26] In an Iowa decision, the court states that the contractual relation of joint adventurers is so similar to those of partners that "the rights between themselves are governed by practically the same rules that govern partnerships."[27] The rule in the principal case appears to be the established rule in America. The only hint of anything contrary is found in the dissenting opinion in a New York Court of Appeals case decided in 1928.[28] This case involved the bad faith of a joint adventurer in renewing a lease for his own self without the knowledge of his associate. The dissenting opinion held that the mere fact that joint adventurers rent property does not call for the strict rule that applies to partnerships. This view was concurred in by two other justices and it might seem that we find here a tendency to change the existing rules. But, a closer examination of the case discloses that the writer of the minority opinion believes the evidence establishes the fact that there never was any expectancy of continuing the adventure beyond the natural termination of the original lease. In the opinion of the majority it is clearly stated that joint adventurers in business enterprises subject themselves to fiduciary duties akin to those of partners.

MASTER AND SERVANT—WORKMAN'S COMPENSATION—EMPLOYER'S RIGHT OF SUBROGATION TO THAT OF EMPLOYEE UNDER JUDGMENT FOR PERSONAL INJURIES AGAINST THIRD PERSONS.—The defendant, doing work for his employer at complainant's place of business, sustained injuries in consequence of which he was entitled to compensation from his employer under the New

[24] Peterson v. Nichols, 90 Wash. 398.
[25] Jackson v. Hooper, 76 N. J. Eq. 185.
[26] Reinig et al. v. Nelson et al., 227 N. W. 14, (Wis. 1929).
[27] Goss v. Lanin, 170 Iowa 57.
[28] Meinhard v. Salmon, 249 N. Y. 458.

Jersey Workman's Compensation Act. The defendant obtained a judgment against the complainant as tort-feasor, and his employer filed notice with the complainant of its right to subrogation to the rights of defendant against the complainant. The New Jersey Act in substance, provides that where injury is caused by the negligence of some third party for which compensation is payable by the employer, the latter is subrogated to the rights of the employee against such tort-feasor to the extent of the money paid or awarded. *Held,* under the Act, the employer, upon filing its notice with tort-feasor, is entitled to subrogation to the rights of the employee against such third party for the money paid by the employer to the employee as compensation under the Act. *Warner-Quinlan Co.* v. *Byram, et al.,* 150 Atl. 212 (N. J. 1930).

Section 29 of the Illinois Act is substantially the same as the New Jersey Act. It provides that where injury for which compensation is payable by the employer under the Act is caused by the negligence of some third person so as to create a liability for damages, such person having elected to be bound by the Act, then the right of the employee to recover against such third person shall be subrogated to the employer who may bring legal proceedings against such other person.[29] "Under Section 29 of the Workman's Compensation Act, if a third party who causes an injury to an employee is bound by the act, the right to recover damages shall belong to the employer and is limited to the amount of compensation paid under the Act, but if the third party so liable for the injury is not bound by the provisions of the Act then legal proceedings may be brought against such party by either the employer or the employee."[30] "Where all parties are under the Act, then under Section 29, the third party is liable to pay to the employer the amount of compensation awarded against him in favor of the employee."[31] A similar finding is reported in Massachusetts.[32] That the employer can only recover the amount paid or obligated to be paid was stated in a Nebraska case: "An employer who has paid compensation under the act to an employee recovering judgment against a negligent third person is entitled to be subrogated to the employee's right in the judgment to the amount of compensation paid."[33] In Michigan it is said, "An employer, upon paying compensation for injuries to an employee sustained through fault and negligence of third person, has two causes of action: one by way of subrogation and the other for indemnification on an implied contract for reimbursement for the money it was compelled to pay on account of the third person's fault."[34]

[29] Cahill, Illinois Revised Statutes, 1929, Ch. 48, Sec. 229.
[30] Goldsmith v. Payne, 300 Ill. 119.
[31] Friebel v. Chicago City Ry. Co. 280 Ill. 76.
[32] Labuff v. Worcester Consolidated Street Ry. Co. 231 Mass. 170.
[33] Dailey v. Sovereign Camp, 106 Neb. 767.
[34] Foster & Glassel Co. v. Knight Bros., 152 La. 596.

Payment by the employer need not be in full before suing the tort-feasor.[35] But the employer must first be obligated to pay.[36] Minnesota holds that an employer may maintain an action in his own name against such tort-feasor when he has paid or obligated himself to pay under the Compensation Act.[37] In Indiana, where a statute similar to the ones in New Jersey and Illinois prevails, the court said, referring to such statute: "It clearly appears that an employer against whom compensation has been awarded for injuries sustained by a servant through the negligence of a third party, may recover not only for the amount of money already paid but also for that for which he has become liable."[38] Without such legislative provision the right does not exist, since under the common law a claim or demand to recover damages for personal injuries is not transferable.[39] But the right of subrogation of the employer to the rights of the employee against a tort-feasor has been established in the majority of the states which have Workman's Compensation Laws.[40]

MORTGAGES—RELEASES—COVENANT FOR RELEASE OF PART OF MORTGAGED PREMISES AS PERSONAL OR RUNNING WITH THE LAND.—Three of the defendants gave a purchase money mortgage to the complainants covering a tract of land which had been subdivided into building lots. The mortgage contained a covenant as follows: "On May 27, 1929, or at any time previous to the date thereof, at the option of the mortgagors, separate releases on any portion of this property may be presented at the office of Gerald A. Caruso, Harrison, New Jersey, or to such other attorney as shall be designated by the mortgagees, and the mortgagees covenant to satisfy by properly executing these releases, such part, parcel, lot, or division of land upon the payment by the mortgagors of an amount in equal portion or division of land having equal release value." After mesne conveyances, Mansfield, Inc., acquired the interest of the original mortgagors. Thereafter, but within the time limited, Mansfield, Inc., presented a release to the designated agent for one hundred lots and tendered the required sum. The complainants refused to give the release, and after the mortgage fell due filed a bill to foreclose. Mansfield, Inc., in its counterclaim to compel the execution of the release, contended that the covenant ran with the land. Complainants contended that the covenant was personal to the original mortgagors. *Held,* that the covenant was

[35] Albrecht v. Whitehead & Kales Iron Works, 200 Mich. 109.

[36] Henderson Telephone & Telegraph Co. v. Owensboro Home Telephone & Telegraph Co., 192 Ky. 322.

[37] City of Red Wing v. Eichinger, 163 Minn. 54.

[38] Wabash Water & Light Co. v. Home Telephone Co. 138 N. E. 692 (Ind. App. 1923).

[39] United States Fidelity and Guaranty Co. v. New York Rys. Co. 156 N. Y. Supp. 615.

[40] Bulletin of the United States Bureau of Labor Statistics, No. 423, p. 72.

personal to the mortgagors. Counterclaim dismissed and foreclosure decreed. *Dimeo et al.* v. *Ellenstein et al.,* 150 Atl. 675 (N. J. Eq. 1930).

A covenant, unlimited as to persons, to release part of the mortgaged premises, subdivided into lots for sale in a development enterprise, is deemed to be for the benefit of the subdivision and inures to the lot owners, though the covenant be to the mortgagor and not also to his assigns.[41] On the other hand, a covenant in a mortgage to release part of the mortgaged premises upon the demand of the mortgagors and payment by them of the consideration price is personal to the mortgagors.[42] A cursory reading of the above mentioned propositions of law as abstract principles might lead to the belief that they are diametrically opposed to one another. However, a careful reading and consideration of them will show that such is not the case and each proposition has its proper place in the law. As to which proposition will control in a given case depends upon the interpretation the court places upon the wording of the covenant in the mortgage. Quite naturally, in the absence of a prior decision directly in point, it is difficult to say what interpretation the courts of last resort will place upon a given covenant. It is believed that the majority of the cases cited in both footnotes to this article will sustain the statement that the courts of last resort, with the possible exception of Massachusetts, are inclined to interpret covenants for partial releases as running with the land, even though the covenant be to the mortgagor and not also to his assigns, unless such interpretation tends to do violence to the language of the covenant.

NEGLIGENCE—ATTRACTIVE NUISANCE—VAT OF BOILING TAR AS CONSTITUTING AN ATTRACTIVE NUISANCE.—The employees of the defendant left a two-wheeled vat for melting tar in front of a building which the defendant was roofing. The defendant's employees left the vehicle in the street with a fire burning in the

[41] Ventnor Investment & Realty Co. v. Record Development Co., 79 N. J. Eq. 103; Van Arsdale et al. v. Grenflo, 93 N. J. Eq. 486; Lane v. Allen, 162 Ill. 427; Gammell v. Goode, 103 Ia. 301; Vawter v. Crafts, 41 Minn. 14; Robins v. Mayer, 191 Pa. 163; Sacramento Suburban Fruit Lands Co. v. Whaley, 50 Cal. A. 125; Ontario Land Co. v. Bedford, 90 Cal. 181; Nims v. Vaughan, 40 Mich. 356; Chrisman v. Hay, 43 Fed. 552; United Real Estate & Trust Co. v. Blochman, 244 Fed. 694. In these cases, the wording of the covenants is to the effect "that the mortgagee will release upon payment," and mentions the mortgagor incidentally, if at all, as one of the parties to the mortgage.

[42] Baldwin v. Benedict, 111 Ia. 741; Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58; Pierce v. Kneeland, 16 Wis. 673; Squier v. Shepard, 38 N. J. Eq. 331; Rugg v. Record, 255 Mass. 247; Gilman v. Forgione, 149 Atl. 620 (Me. 1930). In these cases, the wording of the covenants is to the effect "that the covenant is conditioned upon performance of the other covenants by the mortgagor," and mentions the mortgagor specifically, as a party to the covenant and the person to exercise the option and make payment.

firebox under the tar vat. It emitted dense smoke. The vehicle was left with the wagon tongue resting on a sandpile near the curb. Children of the neighborhood were attracted by the smoke and by the sandpile. One of them, the son of the plaintiff, stepped on the real platform of the vehicle, his weight overbalanced the tongue on the opposite side, causing the barrel of boiling tar to overturn on him burning him to death. The neighborhood was a closely built up residential section. *Held,* This constituted an attractive nuisance. *Morris* v. *Douglas,* 290 Pac. 465 (Cal. 1930).

The elements of an attractive nuisance are: the contrivance which constitutes the nuisance must be artificial and uncommon, as well as dangerous,[43] it must be capable of being rendered safe with ease without destroying its usefulness[44] and of such a nature virtually to constitute a trap into which children shall be led on account of their ignorance and inexperience.[45] There must be a reasonable expectation of the presence of children.[46] In the present case the fact that the neighborhood was a closely built residential section was held sufficient to give defendant constructive knowledge. The doctrine of attractive nuisances originated in America with the turntable cases where the railroad was held liable for injury to children playing on one of the turntables on the railroad's own property.[47] It has spread, chiefly because of the humanitarian attitude of the courts, but it is backed by sound legal principles. The following have been declared to be attractive nuisances: turntables,[48] horse and wagon left unguarded,[49] board piled insecurely,[50] loosely strung electric wires[51] and in fact almost any uncommon, dangerous contrivance or vehicle which is left unguarded.[52] Some courts have even held natural objects such as ponds,[53] and streams[54] to be attractive nuisances. But the weight of authority seems to be against this trend. Although no cases have been found directly in point with this one, several cases were found which at first glance would seem to be contra. For example, a wagon load of asphalt was held not to be an attractive nuisance.[55] A fire in itself is

[43] Loftus v. Dehail, 133 Cal. 214; Znidersich v. Minnesota Utilities Co., 155 Minn. 293; Payne v. Utah-Idaho Sugar Co., 62 Utah 598; Smith v. Illinois Central R. Co., 177 Ia. 243.
[44] Heva v. Seattle School Dist. No. 1, 110 Wash. 668.
[45] Barnhill v. Morgan Coal Co., 215 Fed. 608; Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194.
[46] Hardy v. Missouri Pacific R. R. Co., 266 Fed. 860.
[47] Sioux City & Pacific R. R. Co. v. Stout, 17 Wall. (U. S.) 657.
[48] Gulf, Colorado & Santa Fe Ry. Co. v. McWhirter, 77 Tex. 356; Barry v. St. Louis, Memphis & Southeastern R. R. Co., 214 Mo. 593.
[49] Lynch v. Nurdin, 1 Q. B. 29.
[50] Spengler v. Williams, 69 Miss. 1; St. Louis & San Francisco R. R. Co. v. Anderwood, 194 Fed. 363.
[51] Pierce v. United Gas & Electric Co., 161 Cal. 176.
[52] Valley Planing Mill Co. v. McDaniel, 119 Ark. 139.
[53] Thomas v. Anthony, 261 Ill. 288.
[54] Indianapolis v. Williams, 58 Ind. App. 447.
[55] Newman v. Barber Asphalt Paving Co., 190 Ill. App. 636.

not an attractive nuisance, since fire is such a common occurrence that even children of tender years know that it is dangerous.[56] But a two-wheeled truck loaded with lumber and so evenly balanced that a slight exertion would pull the front end down was held to be an attractive nuisance.[57] Whether a case falls within the rule of attractive nuisances must be determined by the particular circumstances of each case and should be applied only when the facts come fully within the rule.[58]

POWERS—TERMINATION—EFFECT OF INSANITY OF DONOR OF POWER OF ATTORNEY TO CONFESS JUDGMENT ON A NOTE.—The defendant, for a valuable consideration, executed and delivered to the plaintiffs his ten promissory notes. Each note contained a warrant of attorney to confess judgment in favor of the owner and holder thereof at maturity, if the maker defaulted in payment, and to waive all rights of error and appeal. This power of attorney was considered by both parties as additional security for the notes, and without it the plaintiffs would not have been induced to accept them. Subsequent to the time of execution and delivery of the notes and before any judgment had been entered thereon pursuant to the power of attorney, defendant was adjudicated mentally incompetent and a guardian of his person and estate was appointed. After such adjudication and appointment of guardian, default was made in the payment of the notes and the plaintiffs caused judgment to be confessed on the notes. No summons was issued or served upon the defendant. All rights of appeal and error were waived by the attorney who confessed judgment, pursuant to the power of attorney found in the notes. The guardian attempted to vacate judgment on the ground that the court did not have jurisdiction to enter it, since the defendant at the time of the action, was under guardianship as being mentally incompetent. *Held,* a warrant of attorney in a note is a power coupled with an interest and it is not revoked by insanity of the donor. Affirmed. *Swischer* v. *Orrison Cigar Co.,* 171 N. E. 92 (Ohio 1930).

The court, in arriving at its decision, relied greatly on the opinion of Chief Justice Marshall, of the United States Supreme Court, who laid down the following general doctrines: "A letter of attorney may in general be revoked by the party making it and is revoked by his death. Where it forms a part of a contract and is the security for the performance of any act, it is usually made irrevocable in terms, or if not so made, is deemed irrevocable in law. . . . If the power be coupled with an interest, it survives the person giving it and may be executed

[56] Smith v. Illinois Central R. Co., 177 Ia. 243.
[57] Valley Planing Mill Co. v. McDaniel, 119 Ark. 139.
[58] Erickson v. Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., 165 Minn. 106.

after his death. To constitute a power coupled with an interest, there must be an interest in the thing itself and not merely in the execution of the power.''[59] How or when this peculiar security for a debt authorizing a creditor to sign a judgment and issue execution without issuing a writ was first invented, does not appear; but it has now become one of the most frequently used collateral securities in loans of money or contracts to pay annuities.[60] A warrant of attorney given as such to a creditor on a promissory note, confers a valid power and authorizes a confession of judgment in any court of competent jurisdiction in an action brought on such note.[61] In most jurisdictions the courts refuse to permit an insane man to do what he would not have the power to do if he were sane.[62] Also in most jurisdictions the power to confess judgment both by statute and at common law[63] is a power which a sane donor by his own action can not revoke, and consequently, although lunacy, as a rule, will revoke any power of attorney that the principal might have revoked if he were sane, it will not revoke any such power that a sane man could not have revoked.[64] The appointment of one party to act for another is a power coupled with an interest where the interest is in the thing itself upon which the power is to operate, or where the power is created upon a valuable consideration.[65] The power to confess judgment upon a note, being the creditor's security, is therefore a power coupled with an interest.[66] This being so, not even the death or insanity of the grantor or donor will annul the power or suspend its exercise; the debt remains, the right of lien remains, and the power is coupled with them.[67] Thus, where the effect of a contract *inter partes* is to give a right in property or an interest in the subject matter of the agreement itself to the party for whose benefit the execution of the power is intended, the power follows the estate or interest thus agreed to be transferred and becomes irrevocable by operation of law.[68] Therefore, the adjudication of the maker as mentally incompetent can in no way bar the action, for the entry of the judgment is not a new act of the debtor but is a legal result beyond his control.[69]

[59] Hunt v. Rousmanier's Administrators, 8 Wheat. (U. S.) 174.
[60] Chit. Gen. Pr. Vol. II, p. 334.
[61] First National Bank of Las Cruces v. Baker, 25 N. M. 208.
[62] Wassen v. Reardon, 11 Ark. 705; Gordon v. Emmons, 10 N. D. 223; Davis v. Lane, 10 N. H. 156; Cumin v. Holland, 113 Mass. 50; Jones v. Tainter, 15 Minn. 423; Van Meter v. Darrah, 115 Mo. 153; Berry v. Skinner, 30 Md. 567; Matthiessen v. Weichers Refining Co., 38 N. J. Law 536.
[63] Parker v. Poole, 12 Texas 86.
[64] Spencer v. Reynolds, 9 Pa. Co. Ct. 249.
[65] Bonney v. Smith, 17 Ill. 531.
[66] Johnson v. National Bank of Mattoon, 323 Ill. 389.
[67] 2 Perry Trusts, 602.
[68] Lightner's Appeal, 82 Pa. 301.
[69] Johnson v. National Bank of Mattoon, 323 Ill. 389.

PUBLIC SERVICE COMPANIES—DISCONTINUING SERVICE—RIGHT OF TELEPHONE COMPANY TO CUT OFF SERVICE FOR NON-PAYMENT OF DISPUTED BILL.—The plaintiff was presented with his telephone bill by an agent of the defendant telephone company. Believing that he was entitled to a deduction for the time the system was interrupted by a storm and that he was being charged for long distant calls not made, plaintiff requested an itemized statement in order to check the bill, and, in addition, offered to pay half of the bill and the balance when an adjustment could be reached. The defendant refused both request and offer and declared its intention of discontinuing service unless the entire bill was paid. The bill was not paid. Service was discontinued at the plaintiff's residence; and, on several occasions, the plaintiff was refused service at long distance pay stations where he offered to pay in advance. Action for damages was brought for alleged willful, negligent, and conscious invasion of the plaintiff's rights. *Held,* that the plaintiff was entitled to recover. *O'Neil* v. *Citizens' Public Service Co. of South Carolina,* 154 S. E. 217 (S. C. 1930).

By the weight of authority, a public service corporation has the right to discontinue service where the bill is admittedly correct and not in dispute.[70] A provision for the discontinuance of service for non-payment is a reasonable regulation. Since a telephone company is engaged in public service,[71] it would follow that it has the same right to discontinue service for non-payment of an undisputed bill. "Not only are telephone rates fixed and regulated in the expectation that they will be paid, but the company's ability properly to serve the public largely depends on prompt payment; so a regulation establishing a mode of inducing prompt payment is necessary. . . . It is not as if the company had been free to act or not as it chose. It was engaged in public service which could not be neglected. The protection of its own revenues and justice to its paying patrons require that something be done."[72] The cases in support of the above mentioned rule are not cases involving telephone companies, because the doctrine has been so firmly established by the so called "Water Cases"[73] that it has become unnecessary to

[70] Finley Barrell v. Lake Forest Water Co., 191 Ill. App. 269; Sims v. Alabama Water Co., 205 Ala. 378; Shewards v. Citizens' Water Co., 90 Cal. 635; Dodd v. City of Atlanta, 154 Ga. 33; Hatch v. Consumers Co., 17 Idaho 204; Spaulding Mfg. Co. v. Grinnell, 155 Iowa 500; Shiras v. Ewing, 48 Kan. 170; Louisville Tobacco Warehouse Co. v. Louisville Water Co., 162 Ky. 478; Scott v. Dedham Water Co., 224 Mass. 398; Matthews Co. v. Buffalo, 126 N. Y. Supp. 596. Other States following the same rule are: Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, South Carolina, Texas, and Washington.

[71] People v. Western Union Telegraph Co., 166 Ill. 15.

[72] The Southwestern Telegraph and Telephone Co. v. Danaher, 238 U. S. 482.

[73] See footnote 1, *Supra.*

decide the same question in regard to telephone companies. However, there is an exception to the general rule. A public service corporation cannot lawfully discontinue service for a customer's refusal to pay a bill where the correctness of the bill is bona fide disputed.[74] If the corporation discontinues service it does so at its peril and may be held liable in damages.[75] The law in South Carolina is quite clear that a public service corporation cannot refuse service where there is a bona fide dispute as to the bill. The Supreme Court of that state said "The right to cut off the water supply and to refuse to furnish more until past due bills are paid should not be used to coerce the consumer into paying a bill which is unjust or which the consumer in good faith and with show of reason disputed."[76] And "where there is a bona fide dispute as to the amount due, then the water company had no right to require payment of the disputed amount as a condition of restoring its service."[77] As was aptly put by the Supreme Court of Idaho: "A public service corporation cannot safely be invested with a power and authority which will allow it to become both judge and jury in the determination of a disputed claim due it from a customer. To do so would be dangerous and investing it with a power that invites extortion, and is so liable to be abused."[78] A case in Illinois involved a suit to restrain the company from shutting off the water on the plaintiff's premises. The plaintiff failed to pay his bill alleging it to be greatly in excess of what he used, but offered to pay a reasonable amount. The court granted the injunction holding that a consumer of water furnished by a public utility company may restrain the enforcement of an unreasonable charge.[79]

RES GESTAE—OTHER CRIMES—ADMITTING PROOF OF POSSESSION OF WEAPONS NOT USED IN THE CRIME CHARGED.—The defendant, using a .25 caliber pistol killed a man without justification or excuse. The murder took place on the street near the defendant's residence. Defendant was arrested while away from his apartment, and in the voluntary confession made then he also admitted that various other weapons, of different caliber from that used in the crime, which were found in his apartment at the time of the arrest had been there when the homicide was committed. To prove premeditation and thus guilt in the first degree, the state offered these other weapons in evidence so

[74] Sims v. Alabama Water Co., 205 Ala. 378; Louisville Tobacco Warehouse Co. v. Louisville Water Co., 162 Ky. 478; Parton v. Duluth Gas & Water Co., 50 Minn. 175; Dodd v. City of Atlanta, 154 Ga. 33; Spaulding Mfg. Co. v. Grinnell, 155 Iowa 500; McEntee v. Kingston Water Co., 165 N. Y. 27. Also followed by Maryland, Nebraska, Ohio, New Mexico, Pennsylvania; see 28 A. L. R. 475.

[75] 28 A. L. R. 475 and cases there cited.

[76] Poole v. Paris Mountain Water Co., 81 S. C. 438.

[77] Benson v. Paris Mountain Water Co., 88 S. C. 351.

[78] Hatch v. Consumers Co., Ltd., 17 Ida. 216.

[79] Finley Barrell v. Lake Forest Water Co., 191 Ill. App. 269.

that possession of them might characterize the defendant as a desperate type of criminal. They were admitted over objection that defendant's character was not in issue, and an exception was taken. Nowhere in the record is it shown that these weapons had any relation to the crime charged. The defendant was convicted of murder in the first degree and an appeal was made on the grounds that admission of proof of the possession of these weapons was error. *Held,* that the admission in evidence of weapons not used in the crime but left behind at home was error. *People* v. *Zackowitz,* 172 N. E. 466 (N. Y. 1930).

Character is never an issue in a criminal case unless the defendant chooses to make it one.[80] If this is true, it would follow that evidence tending to show a predisposition to an act of crime is inadmissible.[81] So proof of the commission of another crime than the one of which the defendant stands indicted is improper to assist in proving the crime charged, unless the connection be clear to the court.[82] There are exceptions[83] to this rule, but the exceptions are based on the ground that the proof of such other crime enmeshes the accused in the circumstances surrounding the particular crime charged. Implication in the crime charged cannot be shown by proof of the ownership of implements that could have been used for the commission of such a crime, which were not present at the scene of the crime and had no other connection with it.[84] That the facts in the instant case are not within the exceptions above stated is agreed in both the majority and minority opinions. The strong dissenting opinion, however, holds the evidence in this case admissible as one of the elements of the offense—"a part of the history of the case." But the facts in the cases cited in support of this statement[85] all tend to show a definite connection between the second crime and the principal one. The authorities are generally agreed that to make a criminal act evidence of the offense charged there must be some connection between the crimes so that proof of the other crime tends in some way to prove the defendant guilty of the crime of which he is charged.[86] It is held that all the circumstances surrounding an arrest are admissible in evidence as part of the history of the case, and that weapons found in the possession of the defendant at the time of the arrest, although such weapons were not used in the commission of the offense charged in the indictment, are admissible.[87] This rule is limited, however, to weapons found on

[80] Smoot v. State, 146 Ga. 76.
[81] People v. Molineux, 168 N. Y. 264; People v. White, 24 Wend. 574.
[82] Shaffner v. Commonwealth, 72 Pa. 65; Miller v. Curtis, 158 Mass. 127.
[83] People v. Molineux, *Supra.*
[84] People v. Martin, 13 Cal. App. 96.
[85] People v. Governale, 193 N. Y. 581; People v. Rogers, 192 N. Y. 331; People v. Hill, 198 N. Y. 64; People v. Rodawald, 177 N. Y. 408.
[86] People v. Reed, 287 Ill. 606.
[87] People v. Cunningham, 300 Ill. 376.

defendant's person or in the same room with him so as to be under his immediate control, and it does not extend to include the contents of his home when he has been arrested elsewhere.[88] The effect of such evidence certainly must create an impression in the minds of the jury as to the defendant's character, for it shows that at the time of his arrest defendant possessed that criminal intent evidenced by his possession of deadly weapons. But since his arrest and the circumstances surrounding such arrest properly form a part of the case itself, there is clear relevancy to the crime charged and the evidence should be admitted. Here, however, the line is drawn, and to admit evidence of defendant's possession of weapons in his apartment, not under his immediate control, and not clearly relevant to the crime charged, would be an attempt to make his character generally an issue in the case, without its having been introduced in the first instance by the defendant himself.

TRESPASS QUARE CLAUSUM FREGIT—SPACE ABOVE LAND—WHAT CONSTITUTES TRESPASS BY AIRPLANES.—The plaintiff owned a country estate of 135 acres, across the road from which the defendant corporation acquired 272 acres, for the purpose of operating an airport and flying school. Plaintiff at once brought an action to enjoin defendants from continuance of alleged trespasses over plaintiff's land and from maintaining a nuisance. *Held,* that plaintiffs are entitled to injunction restraining defendants from flying over plaintiffs' property at lower altitude than 500 feet. *Swetland et al.* v. *Curtiss Airports Corp. et al.,* 41 Fed. (2d) 928 (Dist. Ct. N. D. Ohio, 1930).

"Aviators have no right, in taking off or in landing, to fly at lower altitudes over adjoining property than minimum prescribed by regulations of Secretary of Commerce where such crossing involves unreasonable interference with property rights or effective possession," according to this decision. The Air Commerce Act of 1926, grants authority to the Secretary of Commerce to promulgate regulations to carry the statute into effect.[89] Pursuant to such authority, the Secretary of Commerce provided, among other regulations: "Exclusive of taking off from or landing on an established landing field, airport or on property designated for that purpose by the owners, . . . aircraft shall not be flown . . . (1) Over the congested parts of cities, towns or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1000 feet. (2) Elsewhere at a height less than 500 feet, except where indispensable to an industrial flying operation."[90] The court, in the instant decision, dis-

[88] State v. Campbell, 7 N. D. 58; People v. Morse, 196 N. Y. 306; People v. Maciejewski, 294 Ill. 390.

[89] Sec. 3 (e) 49 U. S. C. A. sec. 173 (e).

[90] Air Commerce Regulations, Ch. VII, sec. 74 (g).

cussed the Latin maxim, *Cujus est solum ejus est usque ad coelum,* and said that the maxim does not fix unlimited rights to air space in a landowner. The court referred to maxims as but attempted general statements of rules of law and law only to the extent of application in adjudicated cases. After citing cases concerning limits to heights of buildings in cities, the court concluded, "It appears from these authorities that the maxim has never been applied in cases which fix rights in air space normally traversed by the aviator. There are no precedents or decisions which establish rules of property as to such air space." The *ad coelum* maxim was first crystallized as a theory of law by Lord Coke more than three hundred years ago. Many decisions followed which gave effect to its literal translation as giving complete property rights in the subjacent landowner to air space above to all heights. The maxim has been invoked frequently from the time of Lord Coke in actions of trespass *quare clausum fregit* varying in nature from the overhanging of branches of a tree, overhanging eaves, or shooting over, to the thrusting of one's arm over another's land. In all such cases the courts have held that the action of trespass will lie. The Supreme Judicial Court of Massachusetts was recently presented with facts almost identical with those in the case cited here, but it did not go so far as this decision in respect to the *ad coelum* maxim.[91] In the Massachusetts case, the court held that certain flights of less than 100 feet over woodland portions of plaintiff's land constituted trespass but denied relief by injunction. The plaintiff expressly refrained from basing his action on the *ad coelum* theory. Speaking of this decision, in which the court upholds the Massachusetts statute regulating the operation of aircraft,[92] Charles P. Hine said that the court in this case, in holding that the exercise of the police power or the commerce power justifies legislation conferring rights over another's land, goes beyond all precedent in deciding that its provisions constitute valid regulations of the flight of aircraft in air space actually unoccupied by the owner of the underlying land.[93] Edward C. Sweeney, commenting on the Massachusetts decision, referred to above, said, "There have been only two decisions[94] in this country, both by lower courts, passing upon the question of trespass by airplane prior to the present case. . . . The right of harmless passage was in each case upheld, as has been done in a few continental cases which have considered the question."[95] The *ad coelum* maxim as to airplane flights appears to be but a theory in the interest of progress,

[91] Smith et al. v. New England Aircraft Company et al., 170 N. E. 385.
[92] Mass. St., 1929, Ch. 388, sec. 10.
[93] American Bar Assn. Journal, XVI: 218, April, 1930.
[94] Commonwealth v. Nevin, 2 Dist. & County Rep. 241 (Pa. 1922), and Johnson v. Curtis Northwest Airplane Co., 1928 U. S. Av. R. 242 (Minn. 1923).
[95] Journal of Air Law, I: 367, July, 1930.

the modern liberal interpretation being that there is a presumption that the owner of the land is also the owner of the airspace above to the height necessary for buildings, mooring masts, etc., which he may desire in the use of the property. The statutes and court decisions allowing airplane flights at reasonable heights above the space necessary for present use of the land underneath and barring flights at a lower altitude appear to be sound.

EVIDENCE—HEARSAY—ADMISSIBILITY IN EVIDENCE OF REPORT MADE BY DRIVER OF A CAB TO PUBLIC OFFICER, PURSUANT TO LAW FOR THE PURPOSE OF SHOWING AGENCY FOR THE DEFENDANT CORPORATION.—The plaintiffs, husband and wife, were riding in an automobile driven by the husband when it collided with a cab alleged to have been driven by a driver for the defendant company. To prove the driver an agent of the defendant, plaintiffs were permitted to introduce in evidence the report of Peter Irrapino, the alleged driver, made to the State Motor Vehicle Commissioner as required by statute,[96] in which report the defendant was given as the owner of the vehicle. *Held,* the report of an accident by a private individual in accordance with statutory requirement is not admissible as evidence of agency. *Voegeli* v. *Waterbury Yellow Cab Co.,* 150 Atl. 303 (Conn. 1930).

The Supreme Court, in reversing the finding below, pointed out that this report was made by an individual and not by a public officer under the sanction of his office. The statute does not make the contents of the report prima facie evidence of the facts contained in it. Such a report was previously admitted in Connecticut, not to prove the agency of the driver, however, but rather the liability of the defendant on grounds that it was a statement of the agent made during the course of his agency, which as to that particular accident was not terminated till he had made his report.[97] But here, the court said, the plaintiff attempts to prove the agency itself by an admission made after the accident. But agency cannot be proved by the statements of an agent.[98] And the statement of the agent must be a part of the event, not made afterwards.[99] But in states where the statute makes an exception to the hearsay rule and provides that the report to a state official should be prima facie evidence of its contents such report is admissible.[100] In general a public record is admissible as evidence of the facts for which it is kept when there is an official duty to keep such records.[101] But the doc-

[96] Connecticut Statutes, Ch. 195, sec. 18.
[97] Ezzo v. Geremiah, 107 Conn. 670.
[98] Moore v. Rosenmond, 238 N. Y. 356. Meecham on Agency (2nd Ed.) 285.
[99] Gillingham v. Christen, 55 Ill. App. 17; Conover v. Harrisburg & Southern Coal Co., 161 Ill. App. 74.
[100] State v. Torrello, 131 Atl. 429.
[101] People v. Joyce, 154 Ill. App. 13.

trine seems never to have been extended so far as to admit the statements of an agent, even though acting pursuant to statute, to prove the agency. In Illinois, as in many states, a police report is inadmissible to prove the facts contained therein, even though such reports have the sanction of official office.[102] The propriety of the court's ruling is apparent. To allow evidence of this character would be to open the door to misrepresentation of all kinds. The accuracy of legal evidence cannot be supplanted by the extra judicial statements of the agent, even though made pursuant to the obligations of the statute.

[102] Pennsylvania Co. v. McCaffrey, 173 Ill. 177.